No. 92-1914

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

RAYMOND L. LOTTIER,

Petitioner

v.

THE STATE OF WASHINGTON,

Respondent

Petition for writ of certiorari to the Court of Appeals, Division II, of the State of Washington

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether in a trial of an African-American, a trial judge must test through a searching inquiry the prosecution "race neutral" reasons for peremptory challenging the only African-American in the jury venire.

2. Whether in a trial of an African-American the searching inquiry concerning the legitimacy of the "race neutral" reason for a prosecutor's peremptory challenge demands that the prosecutors did use the same standards in evaluating white jurors.

3. Whether in a trial of an African-American a peremptory challenge by the prosecutor of the only African-American in the jury venire denies that defendant of an impartial jury and equal protection of the laws.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Raymond L. Lottier, respectfully petitions for a writ of Certiorari to review the judgment of the Court of Appeals, Div. II, of the State of Washington.

OPINION BELOW

The decision below, is unpublished and it and the denial of discretionary review are reproduced in the appendix of Petitioner at 1a—8a.

JURISDICTION

The decision of the Court of Appeals of the State of Washington was entered on October 19, 1992 and the order denying discretionary review was entered on March 3, 1993. The order was mailed that day and its effective date is March 6, 1993. This Court has jurisdiction under 28 U.S.C. 1257 (a) (1988).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:
"...Nor shall any State deprive ANY PERSON of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protectionof the laws."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "...In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime has been committed."

STATEMENT OF THE CASE

This case involves an African-American who was convicted of second degree assault by an all white jury. The jury became all white when the prosecutor peremptorily challenged Mr. Daniels, the only African-American in the jury venue. This challenge occurred after the ninth juror was examined.

The prosecutor gave two reasons for his challenge. He said: Tr 192:

"One, the overwhelming reason is that there are a variety of factors in Mr. Daniels which add up to a great deal of similarity between him and Mr. Lottier in this case. As the court will hear, Mr. Lottier is a retired major, 30 some-odd years in the military. We've heard from Mr. Daniels — we know that he has 36 years, I believe it was, or in any case, he's worked in the civil service out at Fort Lewis for a substantial period of time and has a lot of contact with the military personnel. We will also hear that Michael Lottier, who is the alleged victim in this case, at the time of this incident which was, I believe, 36 years of age and was living at home. And it was brief summer stay and he had been there about 10 days at the time of this occurance. But I'm also concerned that Mr. Daniels has a 37-year-old son who is living at home at this point in time; that also has a great deal of similarity between the two parties.

I recognize he's been on a jury before, but the fact that they have close military ties, the fact that they both have a son right at the same age who is living at home, I think makes him extremely similar."

He went on to assure the Court that this Petitioner had the duty to show that the reason the prosecutor acted was racially motivated.

The petitioner objected and said at TR 193:

MR. WILLIAMS: It is our position that when you have a jury panel such as this and a minority defendant and a jury panel contains one and only one minority, that the law is that if they're going to exercise a peremptory challenge, the prosecution must show the Court that it is not a racially-motivated challenge. And the problem is just this: that there is a single minority on the entire panel. My client is a minority as well. If, in fact, that single minority is excluded by a peremptory challenge, then there is no one of his race available on the entire panel. He's then facing an entire white panel.

and at TR 196:

> Counsel's proferred explanation here is a similarity in employment and in children with the defendant, Mr. Lottier, a similarity which is enjoyed by at least four of the members of the jury panel. At least four of them are retired military or retired civil service from the fort, have grown children of the same age bracket. Therefore, his proffered explanation does not single our simply a minority juror but would hage to apply to all others.

The trial Court did not probe the prosecutor's explanation but simply upheld the peremptory challenge.

The prosecutor in this case did not challenge three white jurors who had adult children and who had a close connection with the military.

One juror was Mr. Alan Piotrowski who was a retired master sergeant. Sergeant Piotrowski had adult childred, one of whom had just graduated from college and was presently unemployed and may have been living at home temporarily. No specific question was asked by the prosecutor concerning whether Sergeant Piotrowski's children were living at home.

A second juror was Mr. James Cummings worked for 15 years as a machinist at the Bremerton Naval Shipyard and he had adult children. One Unmarried daughter and a son who worked in Tacoma. Again, no questions were asked as to whether these children were living at home.

A third juror was Ms. Gwendolyn Newman. She had worked at the same post exchange as the challenged juror Mr. Daniels and her father was a career military officer. She had stated that she had great respect for the military (Tr 172).

In addition to Mr. Daniels, the prosecutor challenged three other persons and waived his fifth challenge. None of these challenges related in any way to the challenge of Mr. Daniels. The

first challenge was to a Mr. Day, a 25-year-old unemployed laborer who had recently filed an unemployment compensation claim. The second challenge was to a Mr. Orr who had been a victim of an assault and the third challenge was to a Mrs. Emma Redbird who was a school psychologist who liked artsy-craftsy things, Tr 210.

The Court of Appeals, Division II denied Petitioner's appeal based on the peremptory challenge and the Supreme Court of Washington denied discretionary review on March 3, 1993 which mailed to Petitioner pursuant to Rule 18.6. Under that rule, the time begins to run three days after the order is mailed to the party.

REASON FOR GRANTING REVIEW

The reason that this petition should be granted review is to establish *standards* by which the legitimacy of the alleged "non-discriminatory" reasons for excluding African-Americans from petit juries may be evaluated. When *Batson v. Kentucky,* 476 U.S. 79, 90 L.Ed.2d 69, 106 S.Ct. 1712 was decided, Justice White in concurrence, Chief Justice Burger in dissent and Justice Powell for the Court recognized that it would be incumbent upon this Court to articulate such standards in the future.

Thus, Justice White in his concurring opinion said at 102:

Much litigation will be required to spell out the contours of the Court's equal protection holding today, and the significant effect it will have on the conduct of ciminal trials cannot be gainsaid. But I agree with the Court that the time has come to rule as it has, and I join its opinion and judgment.

Chief Justice Burger at 131:

That leaves roughly 7,000 general jurisdiction state trial judges and approximately 500 federal trial judges at large to

find their way through the morass the Court creates today. The Court essentially wishes these judges well as they begin the difficult enterprise of sorting out the implications of the Court's newly created "right". I join my colleagues in wishing the Nation's judges well as they struggle to grasp how to implement today's holding. To my mind, however, attention to these "implementation" questions leads quickly to the conclusion that there is no "good" way to implement the holding, let alone a "best" way.

Justice Powell for the Court at 99 said:

> Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.

In speaking for the Court, Justice Powell referred to *People v. Hall,* 35 Cal.3d 161, 672 P.845 (1983) for guidance. In that case, the Supreme Court of California said at 858, 859:

> Yet it is imperative, if the constitutional guarantee is to have real meaning, that once a prima facie case of group bias appears th eallegedly offending party be required to come forward with explanation to the court that demonstrates other bases for the challenges, and that the court satisfy itself that the explanation is genuine. This demands of the trial judge a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily, ofr "we rely on the good judg-

ment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (Id., at P. 282, 148 Cal.Rptr. 890, 583 P.2d 748.)

The People concede that the defendant established a prima facie case of group bias by demonstrating that five of eight peremptory challenges were used to remove black jurors, and that none remained on the jury. The question then is whether the trial court satisfied its *Wheeler* obligation of inquiry and evaluation in the face of that prima facie case. We conclude that it did not.

While the trial court called upon the prosecutor to come forward with explanation for the peremptory challenges to the black jurors, it is apparent that the court made no serious attempt to evaluate that explanation for the purpose of determining whether it was bona fide. In fact, the record itself contains ample reason to suspect that it was not.

For example, one of the Prosecutor's explanations for challenging juror Simon was that she said she was from Texas and the defendant had indicated that he has "some contact with Texas either in the military or something like that." Actually, juror Simon had stated that she had lived in San Francisco most of her life and in response to a question by the court where she had lived before, she replied, "My family is from Texas." Notably, although the defendant had lived in Chicago, juror Lum, who was not black and had lived in Chicago, was not challenged, and non-black jurors were not asked where they had lived before coming to California. Only one other juror — Cotton, who is black — was asked about residence, and her "Texas connection" was one of the grounds stated by the Prosecution in explanation for the challenge to her as well.

Similarly, the Prosecutor's alternate reason for excluding juror Simon was that she had a son whose age was the same as that of defendant. Three other non-black, female jurors who were not challenged had grown children, among them at

least five of whom were sons, and two who were about the same age as defendant. There was no evidence of the age of Simon's son other than his employment by the State of California.

Such disparate treatment is strongly suggestive of bias, and could in itself have warranted the conclusion that the prosecutor wa exercising peremptory challenges for impermissible reasons. Moreover, and particularly in that light, the explanations offered by the prosecutor for challenging certain of the other black jurors demanded further inquiry on the part of the trial court. Yet the trial court apparently considered itself bound to accept all of the prosecutor's explanations at face value, expressing the view that group bias is shown only when a prosecutor declares an intent to exclude all members of an ethnic group from the jury. Such abdication is inconsistent with the court's obligation under *Wheeler,* and on authority of that case must be held to constitute error requiring reversal.

In this case the prosecutor's reason were equally pretexual. His first peremptory challenge was because the Petitioner and the challenged juror both had a military background. This reason is ludicrous in light of the fact that the military is a major employer in the Tacoma area and includes Fort Lewis, McChord Air Force Base and the Bremerton Naval Shipyard. The Tacoma are also includes many persons who have retired from the military.

Because of the prevalence of military personnel in the area, three other jurors who were not challenged had equally close or closer ties to the military. The other reason given was that it was an interfamily assault of a son, and that Mr. Daniels had a son living at home. Again, as reflected in the Statement of the Case, several white jurors had adult children who may have been living at home. At the time of their questioning, the prosecutor made no effort to determine whether or not such adult children were living at home. One could doubt the significance to the prosecutors of this particular attribute of similarity if no white jurors were ques-

tioned about where their adult children lived. In fact, the Petitioner's son was not living at home, but simply staying there temporarily until a new college term began. Under such a standard, jurors who had adult children who occasionally visited at home should have been challenged.

Turning to the peremptory challenges by the prosecutor, we see his "normal" use of peremptory challenges. First, was unemployed laborer who might be considered anti-law and order. Second, a person who had been assaulted, but was dissatisfied with the result. A prosecutor might have considered such a person to be affected by his previous personal experience. The third person was a school psychologist and was artsy-craftsy, a clear challenge by any prosecutor, as such persons are considered pro-defense. When one looks at Mr. Daniel, outside of his race, he seems a perfect juror. He had served as a juror on four separate occasions indicating that at least eight other lawyers had found him acceptable. He had never been a victim of a crime and had beenactive in the Masons and in church. He certainly has little in common with the peremptory challenges exercised by the prosecution.

The use of peremptory challenges is not to make convictions of African-Americans or other minorities easier. The purpose of such challenges is to have each side exclude the extreme or possibly biased opinions from the decision and allow the decision to be made by a neutral middle group. In the Olympics where judges come from various countries, a form of peremptory challenge exists when the three highest and the three lowest scores are excluded. Such a policy would be ineffectual in a dual meet where one country would have nine judges and the other three judges. By a party of reasoning, the exclusion of the three jurors from the minority would leave the decision in the hands entirely of the majority rather than to a middle group of jurors. Under such circumstances, whether it is white, African-American, Hispanic or Asian, the minority interest is eliminated. If the Petitioner had been white, the eliminating of a white juror by peremptory challenge would have resulted in another white juror and thus the

reason for the challenge would not have an effect on the racial composition of the petit jury. When the Petitioner is African-American and the only African-American juror in the venure is replaced, he is faced with an entirely different situation. The lack of an African-American juror means that there is (1) no one on the jury who has any knowledge of the internal workings of black families, and (2) no one to stop possible anti-African-American references in the jury discussion. As this petition is written, a Louisiana jury has just acquitted a white defendant of the shooting of a Japanese teenage tourist based on self-defense. It is clear from this case that a Japanese jury would have acted differently on the same facts. The jury in that case clearly identified with the white homeowner. In this case an all white jury clearly did not identify with an African-American homeowner who merely fired a warning shot. This is not surprising. This Court in *Georgia v. McCollum,* ____ U.S. ____ 112 S. Ct. 2348, 120 L.Ed.2d 33 (1992) recognized the need for a restriction of racially based peremptory challenges when the Court said at 45:

> Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could only undermine the very foundation of our system of justice--our citizens' confidence in it. Just as public confidence in criminal justice is undermined by a conviction in a trial where racial discrimination has occured in jury selection, so is public confidence undermined where a defendant, assisted by racially discriminatory peremptory strikes, obtains an acquittal.
>
> The final question is whether the interests served by Batson must give way to the rights of a criminal defendant. As a preliminary matter, it is important to recall that peremptory challenges are not constitutionally protected fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial. This Court repeatedly has stated that the right to a peremptory challenge may be witheld altogether without impairing the constitutional guarantee of an impartial jury and a fair trial.

Justice O'Connor in her dissent at page 57 said:

> Considered in purely pragmatic terms, moreover, the Court's holding may fail to advance nondiscriminatory criminal justice. It is by now clear that conscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence. See Developments in the Law-Race and the Criminal Process, 101 Harv. L. Rev. 1472, 1559-1560 (1988); Colbert, Challenging the Challenge, Thirteenth Amendment as a Prohibition against the Racial Use of Peremptory Challenges, 76 Cornell L. Rev. 1, 110-112 (1990).

This case establishes three propositions. First, that a peremptory challenge is not a part of the constitutional systems and is not required, second, that the lack of adequate racial representation on a jury undermines public confidence and third, that the lack of racial representation of a defendant race on a jury may substantially effect a defendant's right to a fair trial.

Thus there was no comparisons between the benefit to the prosecution in allowing him to challenge the only African-American juror when it was clear that he would be replaced with a white juror against the detriment to a African-American defendant who would be tried in a court where he is the only African-American. It is clear that if the state is to retain a right to peremptory challenges it cannot be used to insue all white juries.

In this case, it is clear that the trial judge did not make a searching inquiry as required by a standard set out in *People v. Hall,* supra. It is also clear the Washington State Courts believe that even when the Defendant has made out a prima facie case of racial discrimination, the trial court is free to accept the prosecutor "racially neutral explanation" without a searching inquiry. In fact, the Court notwithstanding its determination that Petitioner did make a prima facie showing, maintained that the Petitioner

has the burden of showing that the statements are pretextual rather than imposing the burden of the prosecution to show why such explanations were consistent with its other exercise or non-exercise of its peremptory challenges. Under the standard in Washington State the whole *Batson* rule becomes a charade if the prosecution need only rationalize his peremptory challenge. Further, it is clear that a different standard to support a peremptory challenge of African-American is necessary when the challenge eliminates the only African-American juror from the panel then when the challenge is made when three or more African-Americans are left on the panel. In the first instance, we are comparing the interest of the prosecution in obtaining a jury that he would prefer against the interest of the Petitioner not to be tried by a jury from which all members of his race has excluded. In such an instance the reasons given by the prosecutor should be given little weight. If on the other hand, Mr. Daniel would have been one of five African-Americans on the jury, the interest of the Prosecutor to a jury of his liking could be accommodated without substantial harm to the Petitioner right to be tried by a jury of his peers including a jury from which African-Americans have not been substantially excluded.

CONCLUSION

This case involves two basic propositions which this court should consider on certiorari. The first is whether the trial judge must make a substantial inquiry to test the "racially neutral" explanation of a peremptory challenge of a minority juror in all cases and second, whether the exercise of a peremptory challenge of the last juror of the same race of the defendant denies that defendant, equal protection of the law and the right to a fair trial under the sixth amendment.

RESPECTFULLY SUBMITTED,

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APPENDIX

IN THE COURT OF APPEALS
IN THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Plaintiff
vs.
RAYMOND L. LOTTIER, Appellant

No. 14755-6-II
DIVISION TWO UNPUBLISHED OPINION
Filed October 9, 1992

PETRIE, J.* -- Raymond L. Lottier appeals a judgment and sentence imposed following his conviction by jury verdict of the crime of second degree assault, RCW 9A. 36. 021 (1) (c). On appeal, he contends (1) the State improperly utilized peremptory challenges; (2) the conditions of his sentence should be altered; and (3) he was denied effective assistance at trial. We find no error and affirm the judgment and sentence. On July 9, 1990, 64-year-old Raymond Lottier and his 37-year-old son, Michael, got into an extended arguement. Michael was temporarily residingwith Raymond. After a day-long series of arguments about various topics, a shouting match ensued with Michael shouting profanities at Raymond. At some point, Michael shouted, "Go get your gun," and Raymond obliged him. After Raymond returned with the gun, Michael allegedly urged Raymond to fire. Raymond did, shooting out the window twelve inches away from Michael.

Raymond was charged with assault in the second degree. He contended that he intentionally shot out the window to frighten Michael, but did not shoot at him. He contended that he was frightened of Michael. One of the State's peremptory challenges removed the only African-American prospective juror. Raymond's objection to the use of a peremptory challenge to remove that juror was denied. The jury convicted Raymond as

* Judge Harold J. Petrie is serving as a judge pro tempore of the Court of Appeals pursuant to CAR 21 (c).

charged. The court imposed an exceptional sentence of 5 months, below the standard range of 15 to 21 months.

Raymond Lottier, who is an African-American, contends that the court erred in denying his objection to the State's use of a peremptory challenge to remove Thomas Daniel, an African-American, from the jury panel. He argues that the State challenged Daniel in order to exclude the only African-American juror, in violaton of *Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). The state responds that the use of one peremptory challenge does not establish the prima facie showing of purposeful discrimination, as required in *Batson,* citing *State v. Powell, 55* Wn. App. 914 916, 781 P. 2d 899 (1989), *review denied,* 114 Wn. 2d 1006 (1990). Alternatively, the State responds that even if a prima facie showing was established, it met its burden of coming forth with a neutral explanation for challenging Daniel. *State v. Morales,* 53 Wn. App. 681, 684, 769 P. 2d 878, *review denied,* 112 Wn. 2d 1028 (1989).

Batson v. Kentucky sets forth the following standards for determining whether a defendant has been denied equal protection by the State's exercise of peremptroy challenges against persons of the same race as the defendant.

Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges "for any reason at all, so long as that reason is related to his view concerning the outcome" of hte case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

. . .

> To establish [a prima facie] case, the defendant must firstshow that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove the venire members of the defendant's race.... Finally, the defendant must show that these facts and any

other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.

. . .

Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors.... [W]e emphasize that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause. But the prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors on the assumption - his intuitive judgment - that they would be partial to the defendant because of their shared race.

Batson v. Kentucky, 476 U.S. at 89, 96-97.

Contrary to the State's argument, *State v. Powell, supra,* is not controlling even though only on peremtory challenge was made against an African-American. In *Powell,* there were three African-Americans in the jury panel, only one of whom was peremptorily challenged. In Lottier's case, the one challenge was made against the only African-American in the jury panel. Thus, the test announced in *Batson* and applied in *State v. Morales, supra,* must be applied. Lottier established a prima facie case of discrimination. He is an African-American and was the only potential African-American juror removed by the State's peremptory challenge.

However, we hold that the State then met its burden of coming forward with a neutral explanation for its challenge of Daniel: his similarity with Lottier, in that Daniel had been a civil service employee at Fort Lewis for many years and Lottier was a retired military oficer, and in that both Daniel and Lottier had 36-year-old sons living at home. Lottier argues that htis explanation is a mere pretext for purposeful discrimination, challenging the validity of the similarities noted by the State. However, Lottier has not demonstrated that the trial court erred in accepting the neutral explanation put forth by the State. To the extent that Lottier sug-

gests that the State had to show that Daniel was actually biased in Lottier's favor, the *Batson* court opined that the neutral explanation was not required to rise to the level of a challenge for cause because of actual bias. The trial court did not err in allowing the State to exercise one of its peremptory challenges against Daniel, based on its neutral explanation for the challenge.

Lottier also asserts that the State engaged in purposeful discrimination when it used another peremptory challenge against Emma Redbird, because she is a Native American. However, Lottier's argument fails for a number of reasons. First, there is nothing in the record demonstrating that Redbird is a Native American. Second, Lottier's trial counsel did not object when the State used its peremptory challenge against Redbird. Finally, *Batson v. Kentucky* applies only to the purposeful challenge of potenital jurors of the same racial group as the defendant. It does not apply to the removal of members of other minority racial groups. *Holland v. Illinois,* 498 U.S. 474, 107 L. Ed. 2d 905, 110 S. Ct. 803 (1990).

Lottier argues, next, that he should be allowed to serve his 5 month sentence through "home detention", pursuant to RCW 9. 94A. 120 (18). However, "home detention" cannot be ordered for persons convicted of violent offenses, including assault in the second degree. RCW 9. 94A. 030 (36).

Finally, in his pro se supplemental brief, Raymond Lottier contends that he was denied effective assistance of counsel because his trial counsel did not: (1) adequately present evidence of Michael's violent tendencies and the strained relationship between him and Michael; (2) adequately present evidence of his health, to show that his fear of Michael was reasonable; and (3) adequately contest the peremptory challenges of Daniel and Redbird. In order to demonstrate ineffective assisntance of counsel, Lottier must show that his counsel's actions fell below an objective standard of reasonableness, and that but for the inadequate performance, there is a substantial likelihood that the result of the trial would

have been different. *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The failure to introduce evidence of Michael's alleged violent propensities and of Raymond's fear, does not fall below the objective standard of reasonableness because the evidence would not have been relevant ot his assertion of being provoked. The defenses of self-defense and duress require that the defendant be confronted by threat or use of force that would result in injury to the defendant or another. RCW 9A. 16. 020 (3); RCW 9A. 16. 060 (1) (a); *State v. Hughes,* 106 Wn. 2d 176, 189, 721 P. 2d 902 (1986). Raymond did not present evidence that Michael had threatened to injure him or another. Thus, the evidence of Michael's alleged violent propensities and Raymond's fear of Michael was not relevant.

As to the third claim of ineffective assistnace, regarding the State's use of peremptory challenges, trial counsel vigorously argued against the State's use of a peremptory challenge against Daniel. Lottier has not demonstrated that counsel's performance fell below an objective standard of reasonableness. The lack of objection to the use of the peremptory challenge against Redbird was not ineffective assistance, ecause there were no grounds upon which to object. Lottier has not established that he was denied effective assistance of counsel.

Judgment and sentence are affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2. 06. 040, it is so ordered.

J. Petrie, Pro Tempore

WE CONCUR:

C.J. Petrich

J. Alexander

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

Raymond L. Lottier,

Petitioner.

This matter came before Department II of the Court on its March 3, 1993, Motion Calendar on Petition for Review. Justice Madsen sat as Justice Pro Tem on Department II [Justice Dolliver did not participate due to illness]. Department II having considered the Petition and the files herein;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

Dated at Olympia, Washington this 3rd day of March, 1993.

Chief Justice

S/James A. Andersen